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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1036 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

JOHN W. DRYE, JR.,
Counsel for the Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable HARLAN FISKE STONE,
Chief Justice of the United States
and Associate Justices of the Supreme
Court of the United States:

Your petitioners respectfully submit their petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on April 19, 1943, reversing the decision of The Tax Court of the United States.

Summary Statement of the Matter Involved

Henry H. Rogers died on July 25, 1935, a resident of Southampton, New York, leaving a Will (R. 60-77) which

was duly admitted to probate and on which letters testamentary were duly issued (R. 46).

The father of said decedent, Henry H. Rogers, Senior, died on May 19, 1909, a resident of the City, County and State of New York, leaving a Will (R. 53-59) which was duly admitted to probate. By said Will, Henry H. Rogers, Senior, created a trust for the benefit of his son consisting of one-fourth of his residuary estate and directed his Trustees to apply the income of said trust to the use of said son until he should attain the age of forty years and at that time to convey to said son one-half of the principal of said trust. Decedent attained the age of forty years on December 28, 1919 and shortly thereafter the share of said trust to which he then became entitled was paid over to him. The Will of Henry H. Rogers, Senior, further provided that the Trustees should apply the income of the remaining one-half of said trust to the use of said son during his lifetime and upon his death that they should "convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York" (R. 46, 47).

By Articles Twelfth and Sixteenth of his Will, decedent exercised the power of appointment over the balance of said trust (R. 47), as follows:

6.667% of the corpus of said trust was appointed in equal shares outright to decedent's widow, Pauline V. Hoving, his daughter Millicent and his grandson Peter; and the balance of the corpus of said trust remaining after payment of said 6.667% was appointed one-third in trust for the benefit of his widow, one-third in trust for the bene-

fit of his daughter and one-third thereof outright to his grandson (R. 48, 49).

The "heirs at law" of decedent "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of the Will of decedent's father were his widow, his daughter and his son, Henry H. Rogers, Junior, who would have taken decedent's real property in equal shares if he had not left a will (R. 49). Thus, decedent's widow, his daughter and his son, if the power of appointment had not been exercised, would each have taken one-third of the trust property outright. Under the exercise of the power of appointment by decedent, his widow and his daughter each took one-third of 6.667% of the trust property outright and each took a life interest in the income of one-third of the balance of the trust property. No part of the trust property was given to decedent's son.

The Tax Court of the United States held that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of the widow and daughter under the Will of decedent's father and that, accordingly, no property passed to them under the exercise of the power. Under this decision the value of the reduced estates was excluded from the decedent's gross estate for Federal Estate Tax purposes (R. 25-27). The Circuit Court of Appeals reversed the determination of The Tax Court of the United States.

Statement of this Court's Jurisdiction to Review

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

The Statute Involved

The Statute involved in this case is the Revenue Act of 1926, c. 27, 44 Stat. 9, the material provisions of which are as follows:

> Sec. 302 (as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 754). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * * * * *
>
> (f) (as amended by Section 803(b) of the Revenue Act of 1932, c. 209, 47 Stat. 279). To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *.

The Question Presented

The question in this case is: Does any property pass under the exercise of a general power of appointment within the meaning of the above-quoted provisions of the Revenue Act when the effect of the exercise of the power is merely to reduce the already vested estates which the appointees had under the will of the donor of the power?

The Reasons Relied Upon for the Allowance of the Writ

1. There is a direct conflict, as the Court below expressly recognized (R. 117), between the decision in the instant case and *Rothensies* v. *Fidelity-Philadelphia Trust Company*, 112 F. (2d) 758 (C. C. A. 3rd) and *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4th).

2. The decision below is in conflict with *Helvering* v. *Grinnell*, 294 U. S. 153.

Conclusion

It is therefore respectfully submitted that this petition for a Writ of Certiorari should be granted.

JOHN W. DRYE, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below.

The opinion in the United States Circuit Court of Appeals for the Second Circuit (R. 113-124) and the opinion in The Tax Court of the United States (R. 25-27) are unreported.

II

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

III

Statement of the Case.

The case has been stated in the preceding petition (pp. 1-3).

IV

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the decision of The Tax Court of the United States;

2. In failing to hold that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of his wife and daughter under the Will of his father and that no property passed to his widow and daughter under his exercise of the power;

3. In holding that the property or estates of the widow and daughter of the decedent in the trust created under the Will of decedent's father should be included as a part of decedent's gross estate for Federal Estate Tax purposes.

V

Summary of Argument.

The effect of the exercise by decedent of the general power of appointment given to him by his father's Will was to reduce the already vested estates which decedent's wife and daughter had under the Will of decedent's father and, accordingly, no property passed to decedent's widow or daughter under the exercise of the power within the purview of Section 302(f) of the Revenue Act of 1926, as amended.

Argument.

Section 302 of the Revenue Act of 1926, as amended, provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * * * *
>
> (f) Property Passing under General Power of Appointment.—To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *."

In *Helvering* v. *Grinnell*, 294 U. S. 153, the donee of a power of appointment had appointed the entire fund to the same persons who would have taken it if the power had not been exercised. The appointees had renounced their right to receive the property under the exercise of the power of appointment and had elected to take the property under the provisions of the will of the donor of the power. This Court held that no property passed under the exercise of the power of appointment and accordingly that no part of the appointed fund was includible in the gross estate of the decedent for Federal Estate Tax purposes. The opinion of the Court reads in part as follows:

> "The crucial words are 'property passing under a general power of appointment exercised by the decedent by will.' Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the prop-

> erty, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative. * * *
>
> "We granted the writ of certiorari in this case because of an alleged conflict with *Wear* v. *Commissioner*, 65 F. (2d) 665, and *Lee* v. *Commissioner*, 61 App. D. C. 33; 57 F. (2d) 399. The reasoning and conclusions of those courts and of the court below cannot be reconciled. *We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right, and we hold accordingly.*" (Italics supplied.)

The lower Court in the *Grinnell* case had pointed out (70 F. (2d) 705, 708):

> "* * * The appointees not only declined to take the gift, but the appointment when exercised in favor of the same persons who would take irrespective of it was 'a mere form with no substance' which the law of New York that regulates the passage of title has refused to recognize. Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882. * * *"

No renunciation was involved in the *Wear* and *Lee* cases where the donees took the same estates under the exercise of the powers of appointment as they would have taken in default of the exercise of the powers. It is submitted that this Court, when it disapproved in the *Grinnell* case of the reasoning and conclusions in the *Wear* and *Lee* cases, decided that, irrespective of any renunciation, when no greater estate was conferred on the appointees by the exercise of the power of appointment the exercise added nothing of substance and no property passed thereby within the purview of the taxing statute. If the appointees' renunciation was the sole ground of the *Grinnell* decision, it seems clear that there would have

been no occasion to disapprove the reasoning and conclusions in the *Wear* and *Lee* cases. While property does not pass to an appointee under the exercise of a power of appointment if the appointee refuses to accept the gift, it seems just as obvious that an exercise of a power of appointment is in substance an empty gesture when it purports to pass to the appointee the same estate which has already vested in him, irrespective of any actual renunciation by the appointee.

Following the decision in the *Grinnell* case, the Circuit Courts of Appeals of the Third and Fourth Circuits and The Tax Court of the United States have held that where a person receives less under the exercise of a power of appointment than he would have received under the instrument creating the power in default of the exercise thereof, the exercise merely cuts down the estate of the appointee and accordingly that the property received by the appointee does not pass under the exercise of the power and the value thereof is not includible in the gross estate of the donee for Federal Estate Tax purposes. *Rothensies* v. *Fidelity-Philadelphia Trust Co.* (3d Cir.), 112 F. (2d) 758; *Legg's Estate* v. *Commissioner of Internal Revenue* (4th Cir.), 114 F. (2d) 760; *Estate of Gertrude Bucknell Day*, 44 B. T. A. 524; *Lewis Spencer Morris, et al., Executors*, 39 B. T. A. 570; *James C. Webster, et al., Executors*, 38 B. T. A. 273.

In *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, *supra*, a resident of Pennsylvania died testate in 1890. He bequeathed to his daughter a share of the income for life from a trust and gave to her a general power of appointment by will as to a similar share of the corpus of the trust. In default of appointment by the daughter, the decedent directed that such share of the corpus of the trust was to be conveyed upon her death to her children, in equal shares, and to the children of any deceased child of hers, *per stirpes*. The daughter, also a resident of Pennsylvania,

died in 1934, and by her will devised and bequeathed the property over which she had power of appointment in trust, to divide the income therefrom into a sufficient number of equal shares and to pay one share of such income to each of her children surviving her or to the issue of any deceased child, *per stirpes*, and one share of such income to her surviving grandchildren and the issue of any deceased grandchild. This distribution of income was to continue until the death of the daughter's last surviving child, at which time the corpus of the trust was to be divided equally among her then surviving grandchildren, *per capita*, and the surviving issue of any deceased grandchild, *per stirpes*. The daughter left her surviving four children, several grandchildren and no issue of any deceased child. Under her will each of her four children took a one-fifth interest for life in the income of the trust and her grandchildren as a class took the remaining one-fifth of the income for the duration of the trust and the whole of the corpus in remainder. No renunciations of the appointments were made.

The United States Circuit Court of Appeals for the Third Circuit held that under the law of Pennsylvania a devisee under a donor's will in default of appointment takes a vested estate under the will of the donor, subject to be divested by the exercise of the power of appointment and that the effect of the daughter's appointment to each of her children of a life estate in the trust property was merely to limit and thus reduce her children's already vested estates under the will of their grandfather. Consequently the Court decided that the value of the life estates of the daughter's children should not have been included in the daughter's gross estate for federal estate tax purposes. In reaching this decision, the Court overruled its prior decision in the *Wear* case and followed what it considered the clear mandate of the Supreme Court in the *Grinnell* case.

The Court stated (112 F. (2d) 762):

> "If the appointee's rejection of the donee's bequest was of controlling importance to the decision in the Grinnell case, as the Collector argues, then the conclusions of the Circuit Courts of Appeals in the Wear and Lee cases, where the appointees did not reject, could have been reconciled with the conclusion of the Circuit Court of Appeals in the Grinnell case, where the appointees did reject; and the fact that the Supreme Court found the respective conclusions to be irreconcilable clearly implies that the question as to the incidence of the appointees' title depended for its solution upon the effect of the donor's and donee's wills under local law rather than upon the voluntary act of the appointees in receiving the property."

The Court in the *Rothensies* case further stated at page 763 as follows:

> "What therefore, of the devise over in default of appointment, remains undivested after the donee's exercise of the power passes under the will of the donor. As the whole includes all of its parts so does a fee embrace all of the estates that may be carved therefrom. Consequently, the effect of Mrs. Hopper's appointment to her children of an undivided one-fifth interest to each in the equitable estate in the property for life instead of an undivided one-fourth to each in the legal estate in fee, * * * was merely to limit and thus reduce the extent of her children's already vested estates under the will of their grandfather and from whose will they derived their title."

In *Legg's Estate* v. *Commissioner of Internal Revenue, supra*, a similar determination was made by the Circuit Court of Appeals for the Fourth Circuit in a case also involving a power of appointment given by the will of a decedent resident in Pennsylvania. In that case decedent's daughter, in the absence of the exercise of the power of appointment, would have taken the entire corpus of a trust created for the benefit of her mother. Under the exercise

of the power, the daughter took an equitable life estate in a part of such corpus. It was held that the value of the daughter's life estate should not have been included in the value of the property "passing" by the exercise of the power. The Court said (114 F. (2d) 765):

> "When the power was exercised by the donee, the result was, not that property passed thereby to Mildred Webster Legg, but that the estate which had previously vested in her was cut down from a fee-simple interest in the whole to an equitable life estate in a part. What was taken away from her by the exercise of the power passed under the power, but not what was left. That had already vested in her under the will of her grandfather, the original donor."

In *James C. Webster, et al., Executors, supra,* and *Lewis Spencer Morris, et al., Executors, supra,* as in the instant case, the Tax Court arrived at similar determinations, where the applicable law was the law of the State of New York.

It seems clear that these cases have correctly interpreted the New York law, which is the same as the Pennsylvania law involved in the *Rothensies* and *Lee* cases.

Section 40 of the New York Real Property Law provides as follows:

> "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

Section 41 of the same Law provides as follows:

> "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

It is therefore apparent that the persons designated by the Will of decedent's father to take in default of the exercise of the power of appointment given to decedent had a vested remainder interest in the trust fund. *Matter of Lansing*, 182 N. Y. 238; *Connolly* v. *Connolly*, 122 App. Div. 492; *Matter of Haggerty*, 128 App. Div. 479, 194 N. Y. 550; *Crackanthorpe* v. *Sickles*, 156 App. Div. 753. Upon the exercise of the power of appointment by decedent, the interests in the trust thus vested in decedent's widow and daughter were cut down to the extent indicated above. *Matter of Lichtenstein*, 177 Misc. 320, 327; *Matter of Harbeck*, 161 N. Y. 211, 218; *Matter of Lansing, supra; Matter of Chapman*, 133 App. Div. 337, 199 N. Y. 562.

The most recent decision by the New York Court of Appeals in this connection is *Matter of Duryea*, 277 N. Y. 310, in which the Court considered the same trusts which were before the Board of Tax Appeals in *James C. Webster, et al., Executors, supra.* The persons designated in the trust instruments in question to take in default of the exercise of the powers of appointment were the decedent's two children. However, decedent appointed one-half of the trust funds to her daughter and the other half to an adopted son, thereby excluding from participation her natural son. In holding that the property passing to the daughter of the donee was not to be included in the donee's estate for New York Estate Tax purposes where the statute imposed a tax on "property passing under a general power of appointment exercised by the decedent by will", the Court said (p. 318):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule to be applied can be reached only by an entire disregard of any intention to elect or what has been termed an election and may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

The opinion of the Court in the *Duryea* case, at page 319, continues as follows:

> "The question is not what Lisa W. Heighe would take if she renounced her rights to take by the appointment made and elected to take under the will of the donor of the power, but rather what she would have taken had the power not been exercised to any extent. In that case she would have taken one-half under the will of the donor. The donee of the power might have said, 'I give to Lisa W. Heighe the share which she would have taken under the will of Ellen W. Duryea and to Baronig Baron the share which Robert H. Heighe would have taken.' That would have been a good appointment, would have precluded Robert H. Heighe from taking a share in the trust estate under the Duryea will and would have given to Lisa W. Heighe exactly what she would have taken under the Duryea will had no appointment been made. While the donee of the power did not mention the fact that such was the disposition she was making of the fund, it is entirely clear that such was the intent and effect of the appointment made."

In *Matter of Canda*, 114 Misc. 161 (reversed on other grounds, 197 App. Div. 597), the Court held that where the decedent by her will exercised powers of appointment in favor of her trustees with life estates to her children and the transfer to the children was part of what they would have received under the wills of their ancestors if the powers had not been exercised, the appraiser erred in including the value of the life estates as taxable. In *Matter of Lichtenstein*, 177 Misc. 320, the persons who would have taken in default of the exercise of the power of appointment received under the exercise thereof interests in the property deferred until they reached specified ages and it was held that the appointees took under the will of the donor of the power. It is accordingly well settled under the New York law that where a person who would have taken in default of the exercise of the power takes less under the exercise of the power, even though his interest in default would have been a fee simple and his interest under

the exercise of the power is in trust, the interest is taken under the will of the donor of the power and is not subject to tax in the estate of the donee.

In the Circuit Court of Appeals Judge Frank based his opinion solely upon the fact that there had been no renunciation by decedent's widow and daughter of their rights under the exercise of the power and no election by them to take under the will of the donor, stating that it seemed clear to him that such renunciation was necessary under the decision of this Court in *Helvering* v. *Grinnell, supra.* Judge Hand, in his concurring opinion, disagreed on this point with Judge Frank, whose decision, as stated by him, is in conflict with the decisions of the Third and Fourth Circuit Courts of Appeals in the *Rothensies* and *Legg* cases, *supra.* Judge Hand based his opinion upon two circumstances: "first, the life estates to the wife and daughter were equitable, not legal; and second, Peter, who was not a legatee in default, was an appointee, while Henry III, who was not an appointee, was a legatee in default." In so doing, Judge Hand has entirely ignored the well-settled law of New York, as enunciated in the *Duryea, Canda* and *Lichtenstein* cases, *supra,* and his decision is in conflict with the decisions of the Circuit Courts of Appeals for the Third and Fourth Circuits in the *Rothensies* and *Legg* cases, *supra.*

Conclusion.

In view of the conflict in the cases and the errors made by the Court below it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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